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# TORT LAW—THE LOCALITY RULE IN LEGAL MALPRACTICE LITIGATION: AN INAPPROPRIATE METHOD OF DEFINING THE REQUIRED STANDARD OF CARE—*Ruso v. Griffin*, 147 Vt. 20, 510 A.2d 436 (1986)

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TORT LAW—THE LOCALITY RULE IN LEGAL MALPRACTICE LITIGATION: AN INAPPROPRIATE METHOD OF DEFINING THE REQUIRED STANDARD OF CARE—*Russo v. Griffin*, 147 Vt. 20, 510 A.2d 436 (1986).

INTRODUCTION

“Lawyers who handle personal injury cases, work in firms of five or fewer[,] . . . and have at least [ten] years experience are among the most likely targets for malpractice claims.”<sup>1</sup> The majority of these malpractice claims allege attorney negligence.<sup>2</sup> To recover for their negligence claims, clients must prove more than just a bad result. They must be able to prove that the attorney’s performance did not meet the appropriate standard of care, which requires reasonable conduct under the circumstances, and that the attorney’s failure to meet the standard of care caused their injury.<sup>3</sup> The standard of care refers to a set of criteria used by the trier of fact to determine the adequacy of the attorney’s conduct.<sup>4</sup> One aspect of the standard of care formulation on which many courts disagree is what, if any, geographic limitation should be used to determine the appropriate standard.<sup>5</sup>

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1. Marcotte, *Suing Lawyers: Malpractice Targets Profiled*, A.B.A. J., Apr. 1986, at 25 (citing findings of American Bar Association’s committee on lawyers’ professional responsibility).

2. Gates, *Lawyer’s Malpractice: Some Recent Data About a Growing Problem*, 37 MERCER L. REV. 559, 562 (1986) (Analysis of alleged attorney errors indicates that 70.1% of all claims were for negligence arising from either administrative or substantive errors. The remaining claims arose out of client relations or intentional wrongs.).

3. R. MALLIN & V. LEVIT, LEGAL MALPRACTICE § 100 (2d ed. 1981).

4. *Id.* at §§ 250-51. Criteria important to this determination are “the requisite skill and knowledge; the degree of skill and knowledge to be possessed and exercised; the effect of local considerations and customs; and any special abilities possessed by the lawyer.” *Id.* at §§ 251-52. Examples of standard of care formulations are as follows: “at least that degree of care, skill and diligence which is exercised by prudent practicing attorneys in his locality,” *Ramp v. St. Paul Fire & Marine Ins. Co.*, 263 La. 774, 786, 269 So. 2d 239, 244 (1972); “that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in this jurisdiction” . . . .” *Russo v. Griffin*, 147 Vt. 20, 24, 510 A.2d 436, 438 (1986) (quoting *Cook, Flanagan & Berst v. Clausing*, 73 Wash. 2d 393, 395, 438 P.2d 865, 867 (1968)).

5. In formulating a standard of care for legal malpractice litigation, courts have not agreed on one geographic area which is appropriate for measuring acceptable legal practice. The geographic areas chosen range from a local community to the entire nation. *See, e.g., Wright v. Williams*, 47 Cal. App. 3d 802, 809, 121 Cal. Rptr. 194, 199 (1975) (standard based upon same or similar locality); *Kellos v. Sawilowsky*, 254 Ga. 4, 5, 325 S.E.2d 757,

This note examines the appropriateness of using a geographic limitation to define the standard of care in legal malpractice litigation. First, this note discusses the Vermont Supreme Court's decision in *Russo v. Griffin*,<sup>6</sup> where the court adopted a state wide standard of care<sup>7</sup> overruling its prior decisions applying a locality standard.<sup>8</sup> This section includes an analysis of the rationale used by the Vermont court and other courts to overturn the locality rule. The analysis includes discussion of (1) the locality standard, (2) the state standard, (3) a national standard based upon the legal profession generally, and (4) a national standard for the legal specialist. Second, the note analyzes the evolution of the standard of care in medical malpractice litigation from a locality standard to a general profession standard. The medical standard evolution is important in formulating the legal malpractice standard because many courts draw an analogy between medical and legal malpractice.<sup>9</sup> Finally, the note proposes a model standard of care which is devoid of any geographic limitation yet includes the criteria important in determining the acceptability of an attorney's conduct.

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758 (1985) (standard based on legal profession generally with no reference to a particular locality); *Ramp*, 263 La. at 786, 269 So. 2d at 244 (standard based on attorney's locality); *Russo*, 147 Vt. at 24, 510 A.2d at 438 (standard based on attorney conduct throughout the state).

6. 147 Vt. 20, 510 A.2d 436 (1986).

7. *Id.* at 24, 510 A.2d at 438.

8. *Hughes v. Klien*, 139 Vt. 232, 233, 427 A.2d 353, 354 (1981) ("The standard for legal services, as in other professions, is the exercise of the customary skill and knowledge which normally prevails at the time and place."); *In re Cronin*, 133 Vt. 234, 240, 336 A.2d 164, 168 (1975) ("The standard of adequacy of legal services as in other professions is the exercise of customary skill and knowledge which normally prevails at the time and place.") (quoting *Moore v. United States*, 432 F.2d 730, 736 (3rd Cir. 1970)).

9. *See, e.g.*, *Berman v. Rubin*, 138 Ga. App. 849, 853, 227 S.E.2d 802, 806 (1976) (Georgia requires expert testimony in both legal and medical malpractice to determine whether the defendant's conduct is negligent); *Dean v. Conn*, 419 So. 2d 148, 149 (Miss. 1982) ("Generally the same standards of professional conduct are applicable to the attorney and physician alike. . . ."); *McCullogh v. Sullivan*, 102 N.J.L. 381, 384, 132 A. 102, 103 (1926) (duty between an attorney and client is the same as between doctor and patient); *Russo*, 147 Vt. at 23, 510 A.2d at 438 (reasoning of courts rejecting the locality rule in medical malpractice litigation is applicable to legal malpractice).

The analogy between medical and legal malpractice may not be as conceptually sound as these courts have assumed. There are many differences between the medical and legal professions which could be explored to discredit the court's use of the analogy. With this limitation in mind, this note seeks only to explore how the analogy has been used to justify changes in the standard of care in legal malpractice litigation, and not whether the analogy is appropriate.

I. *RUSO V. GRIFFIN*A. *The Facts and Procedural History*

*Russo* arose when attorney Griffin's client, J. A. Russo Paving, Inc., filed suit alleging Griffin's negligence in failing to inform the corporation of the desirability of a non-competition agreement during a corporate buy out.<sup>10</sup> J. A. Russo Paving, Inc. was a family held paving business in Rutland, Vermont. Joseph Russo incorporated the business in 1975 to transfer his interest to his sons, Anthony and Frank.<sup>11</sup> Griffin arranged the incorporation, and subsequently all annual meetings were held in his office.<sup>12</sup>

The buy out arrangement occurred when Frank Russo wished to sell his interest in the corporation to finance the purchase of a local laundromat.<sup>13</sup> Griffin arranged a transfer of Frank's stock to the corporation. The transfer was secured by a \$6000 promissory note from the corporation which was personally guaranteed by Anthony Russo and his wife.<sup>14</sup>

The Vermont Supreme Court summarized Griffin's alleged misconduct in the stock transfer as follows:

At no time during the meeting did . . . Griffin inform the corporation or Tony Russo, the sole remaining shareholder, of the desirability of obtaining a covenant not to compete or explain the implications thereof. Three months after the stock transfer, Frank went back into the paving business in Rutland in direct competition with the plaintiff corporation. A properly drafted non-competition covenant would have prevented this from occurring.<sup>15</sup>

During trial, the plaintiff produced two practicing attorneys from the Burlington, Vermont area as expert witnesses. They testified that "Griffin's failure to exact a covenant not to compete deviated from the standard of care required of attorneys practicing in Vermont at the time."<sup>16</sup> Griffin produced two attorneys from Rutland who testified that his failure to recommend a non-competition covenant in the buy out of a family member in a closely held business did not deviate from the standard of care for Rutland area attorneys.<sup>17</sup> The trial court,

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10. *Russo*, 147 Vt. at 22, 510 A.2d at 437.

11. *Id.* at 21, 510 A.2d at 436.

12. *Id.*

13. *Id.*

14. *Id.* at 21, 510 A.2d at 437.

15. *Id.* at 22, 510 A.2d at 437.

16. *Id.*

17. *Id.*

having to choose between conflicting expert testimony regarding the propriety of Griffin's conduct, relied on Vermont's locality rule<sup>18</sup> and held that Griffin did not breach the standard of care for Rutland attorneys and therefore was not negligent.<sup>19</sup> The plaintiff-corporation appealed the verdict, challenging the trial court's application of the locality rule as part of the required standard of care.

### B. *The Locality Rule*

The Vermont Supreme Court in *Russo* faced a challenge to the continued validity of a standard of care defined by the locality of the attorney's practice.<sup>20</sup> The Vermont court adopted the locality rule in *In re Cronin*,<sup>21</sup> which involved a prisoner's claim for post conviction relief.<sup>22</sup> In *Cronin* the trial court held that the standard for determining whether a defendant was denied effective assistance of counsel was whether the attorney's conduct amounted to a "mockery of justice."<sup>23</sup> On appeal, the Vermont Supreme Court held that "[t]he standard of legal services as in other professions is the exercise of the customary skill and knowledge which normally prevails at the time and place."<sup>24</sup>

The Vermont Supreme Court later applied the locality rule to a legal malpractice action in *Hughes v. Klien*.<sup>25</sup> In *Hughes*, the plaintiff filed a small claim action against her attorney for advice allowing the release of a spouse's bank records during divorce proceedings. The plaintiff claimed that the subsequent cost to photocopy the records was unnecessary.<sup>26</sup> The Vermont Supreme Court affirmed the trial court's conclusion that the attorney's advice was consistent with community standards, citing *Cronin* as authority on the appropriate stan-

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18. See *supra* note 8.

19. *Russo*, 147 Vt. at 22, 510 A.2d at 437.

20. *Id.*

21. 133 Vt. 234, 336 A.2d 164 (1975).

22. *Id.* at 235, 336 A.2d at 165. The appellant Cronin claimed that his plea of nolo contendere was the result of ineffective assistance of counsel, and that the trial court applied an improper standard in determining the acceptability of his attorney's conduct. *Id.* at 235, 336 A.2d at 166-67.

23. *Id.* at 238, 336 A.2d at 167 (citing *State v. Rushford*, 127 Vt. 105, 241 A.2d 306 (1968); *In re Murphy*, 125 Vt. 272, 214 A.2d 317 (1965)).

24. *Cronin*, 133 Vt. at 240, 336 A.2d at 168 (quoting *Moore v. U.S.*, 432 F.2d 730, 736 (3d Cir. 1970)). As in *Cronin*, the issue in *Moore* was the determination of what constitutes ineffective assistance of counsel. *Moore*, 432 F.2d at 732. In adopting the standard for legal services, *Moore* cited the *Restatement (Second) of Torts* § 299A. *Id.* at 736 n.24.

25. 139 Vt. 232, 427 A.2d 353 (1981).

26. *Id.* at 233, 427 A.2d at 353-54.

dard of care formulation.<sup>27</sup>

In overturning Vermont's locality rule, the court in *Russo* noted that the rule developed in the late nineteenth century, in the context of medical malpractice litigation, to compensate for the disparity between medical practitioners in rural and urban areas.<sup>28</sup> "The rule was unquestionably developed to protect the rural and small town practitioner, who was presumed to be less adequately informed and equipped than his big city brother."<sup>29</sup> Subsequently, courts applied the locality rule to legal malpractice litigation, holding that an attorney is required to possess only the skill and diligence ordinarily possessed by other attorneys in the locality.<sup>30</sup>

Inclusion of the attorney's locality as a factor in the standard of care formulation means the attorney's performance is compared solely against other attorneys practicing in that locality.<sup>31</sup> This comparison results because a locality based standard is commonly phrased as the degree of care, skill, diligence, and knowledge possessed and exercised by reasonable attorneys "at the time and place,"<sup>32</sup> or "in that locality."<sup>33</sup> Courts which apply a locality standard limit the application of the competency criteria to attorneys practicing in a certain geographic area because they presume that an attorney's conduct is dictated by local rules, customs, or practices.<sup>34</sup>

27. *Id.* at 233, 427 A.2d at 354.

28. *Russo*, 147 Vt. at 23, 510 A.2d at 437. For a discussion of the standard of care in medical malpractice litigation, see *infra* text accompanying notes 98-117.

29. *Id.* (quoting *Shilkret v. Annapolis Emergency Hosp. Ass'n*, 276 Md. 187, 193, 349 A.2d 245, 248 (1975)).

30. *Patterson & Wallace v. Frazier*, 79 S.W. 1077, 1080 (Tex. Civ. App. 1904) ("An attorney is expected and required to possess such reasonable skill and diligence in all questions relating to his profession as are recognized by the profession where he practices law.") (quoting Annotation, *Liability of Attorney to Client for Mistake*, 1901 L.R.A. 883, 893).

31. See *infra* notes 34-35 and accompanying text.

32. *Hughes v. Klien*, 139 Vt. 232, 233, 427 A.2d 353, 354 (1981); *In re Cronin*, 133 Vt. 234, 240, 336 A.2d 164, 168 (1975).

33. *Ramp v. St. Paul Fire & Marine Ins. Co.*, 263 La. 774, 786, 269 So. 2d 239, 244 (1972) ("in his locality"); *Dean v. Conn.*, 419 So. 2d 148, 149 (Miss. 1982) ("in that locality").

34. *Cook v. Irion*, 409 S.W.2d 475, 478 (Tex. Civ. App. 1966). Holding that expert testimony of an attorney from another county was not competent, the court stated:

[A]n attorney practicing in a vastly different locality would not be qualified to second-guess the judgment of an experienced attorney of the El Paso County Bar as to who should be joined as additional party defendants. . . . The importance of knowledge of the local situation is fully demonstrated by the well-recognized practice among lawyers of this state in associating local counsel in the trial of most important jury cases.

*Id.*

An effect of applying a locality based standard is that available expert testimony necessary to establish attorney negligence will be limited.<sup>35</sup> Expert testimony from other attorneys is essential to the plaintiff's case because only an attorney is competent to testify whether the defendant-attorney's conduct met the required standard of care.<sup>36</sup> Limiting available expert testimony to that from local attorneys allows a locality to set its own standard of care because only local attorneys may testify as to what is acceptable legal conduct. In *Russo*, the trial court's reluctance to accept the expert testimony of the Burlington attorneys on the appropriate standard of care effectively allowed the Rutland attorneys to dictate what was proper conduct in their community at the time because their testimony was, in effect, uncontradicted. Limiting outside expert testimony also promotes a conspiracy of silence because local attorneys are reluctant to testify against each other,<sup>37</sup> especially in a small community.<sup>38</sup>

While some commentators have justified the use of a locality based standard when the attorney's alleged negligence involves the application of local rules, customs, or practices,<sup>39</sup> its application cannot be justified when the negligence involves general principles of law.<sup>40</sup> Several jurisdictions, however, including Vermont until *Russo*, adhere to the locality rule<sup>41</sup> even though its application may not be justified

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35. In *Russo* the Vermont Supreme Court noted the effect of the locality rule on expert testimony:

[T]he trial court erroneously applied the locality rule in defining the applicable standard of care. This ruling clearly prejudiced the plaintiffs as the court chose to accept the testimony of defendants', rather than plaintiff's, expert witnesses on the rationale that they were from the Rutland area, and therefore were more familiar with the applicable standard to [sic] care.

*Russo v. Griffin*, 147 Vt. 20, 25, 510 A.2d 436, 439 (1986). See also, *Cook*, 409 S.W.2d at 478 ("an attorney practicing in a vastly different locality would not be qualified to second-guess the judgement of an experienced attorney of the El Paso County Bar . . .").

36. R. MALLEN & V. LEVIT, *supra* note 3, at § 665.

37. *Floro v. Lawton*, 187 Cal. App. 2d 657, 675, 10 Cal. Rptr. 98, 109 (1960); R. MALLEN & V. LEVIT, *supra* note 3, at § 254 ("The plaintiff may find extreme reluctance among local practitioners to testify against a fellow attorney.").

38. R. MALLEN & V. LEVIT, *supra* note 3, at § 254.

39. See, e.g., Note, *Attorney Malpractice*, 63 COLUM. L. REV. 1292, 1305 (1963); Note, *Standard of Care in Legal Malpractice*, 43 IND. L.J. 771, 782 (1967-68); Comment, *New Developments in Legal Malpractice*, 26 AM. U.L. REV. 408, 417 (1976-77) [hereinafter *New Developments in Legal Malpractice*].

40. This note ultimately concludes that a locality based standard is inappropriate not only when the attorney's alleged negligence involves general principles of law, but also when the alleged negligence involves the application of local rules, customs, or practices. A locality based standard is inappropriate because these "local factors" are considered in the knowledge portion of the standard of care. For discussion of the model standard of care formulation proposed by this note, see *infra* Section III.

41. See, e.g., *Palmer v. Nissen* 256 F. Supp. 497, 501 n.10 (D. Me. 1966) ("The

by the importance of local considerations.

In *Russo*, the alleged misconduct was attorney Griffin's failure to advise his client of the desirability of a non-competition agreement during a corporate buy out of a family held business. Advising a family held business in this situation is not unique to Rutland, Vermont. Attorneys everywhere face similar situations. The standard of care dictating the minimum acceptable advice given to a family held business structuring a buy out should not vary from locality to locality.<sup>42</sup>

A variation in standards is evident when two attorneys from different localities are faced with advising the same type of client under the same circumstances. In such a situation, adherence to a locality rule prevents the trier of fact from using a uniform standard of care to determine if the attorney was negligent, because the attorney's action in each locality will be measured against what other attorneys in the locality normally do. This, in effect, allows each locality to set its own standard of care which means that where the members of the local bar are collectively incompetent there will be a low standard of care in that locality.<sup>43</sup>

Local considerations influencing an attorney's action, which may justify the application of the locality rule by the court,<sup>44</sup> are lacking in

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parties agree that defendant's duty, as an attorney, to plaintiffs . . . must be measured by the standards of professional conduct prevailing in the community in which he did his work."); *Mylar v. Wilkinson*, 435 So. 2d 1237, 1239 (Ala. 1983) ("[A] lawyer is required to exercise an ordinary and reasonable level of skill, knowledge, care, attention, and prudence common to members of the legal profession in the community."); *Rhine v. Haley*, 238 Ark. 72, 82, 378 S.W.2d 655, 661-62 (1964) (testimony of local attorney is evidence of the standard of conduct for attorneys in that community); *Ramp v. St. Paul Fire & Marine Ins. Co.*, 263 La. 774, 786, 269 So. 2d 239, 244 (1972) ("An attorney is obligated to exercise at least that degree of care, skill, and diligence which is exercised by prudent practicing attorneys in his locality."); *Dean v. Conn.*, 419 So. 2d 148, 150 (Miss. 1982) ("Both are required to exercise that degree of care, skill and diligence which is commonly possessed and exercised by attorneys/physicians in that locality."); *Rorrer v. Cooke*, 313 N.C. 338, 356, 329 S.E.2d 355, 366 (1985) (defining the third prong of the standard set out in *Hodges v. Carter*, 239 N.C. 517, 80 S.E.2d 144 (1954) as follows: "The standard is that of members of the profession in the same or similar locality under similar circumstances."); *Cook v. Irion*, 409 S.W.2d 475, 477 (Tex. Civ. App. 1966) (rejecting expert testimony on appropriate conduct under the circumstances from an attorney who practiced in a different locality).

42. R. MALLEN & V. LEVIT, *supra* note 3, at § 254. ("Although local considerations are important, such consideration should not become a means of reducing the standard of care or a means of insulating local attorneys.").

43. A locality may also set a low standard of care if members of the local bar adhere to a customary practice that is considered unacceptable in other jurisdictions. See *infra* note 58 and accompanying text. A higher than expected standard is possible if all members of the local bar are extremely well qualified, or if their customary practice exceeds what is acceptable in other locales.

44. See sources cited *supra* note 41.



other jurisdictions applying it. In *Ramp v. St. Paul Fire & Marine Ins. Co.*<sup>45</sup> the plaintiffs alleged their attorney was negligent in advising them to accept a compromise agreement in settling their father's estate.<sup>46</sup> The court in *Ramp* defined the appropriate standard of care as "that degree of care, skill, and diligence which is exercised by prudent practicing attorneys in . . . [the] . . . locality."<sup>47</sup> Although the locality rule was designed to compensate for the difference in rules and practices among localities, its application by the Louisiana court was unnecessary to effectuate that purpose. Considering the attorney's locality was unnecessary because the issue in *Ramp* was not whether the defendant misapplied a local rule or ordinance, but rather whether the attorney was negligent in failing to advise the plaintiffs of their rights under state law before having them sign a compromise agreement. Furthermore, although the court focused on the defendant-attorney's locality and applied the locality rule in determining whether the attorney was negligent, the court held the attorney to a minimum standard of care applicable to all members of the legal profession who advise clients on succession rights, and did not differentiate on the basis of locality.<sup>48</sup> However, by applying a locality based standard, the Louisiana Supreme Court emphasized that a court should focus on how local attorneys act under the circumstances and not how a reasonable attorney would act.<sup>49</sup>

The Mississippi Supreme Court also has applied the locality rule to determine whether an attorney's actions were negligent even though the actions may not have been influenced by local considerations. In

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45. 263 La. 774, 269 So. 2d 239 (1972).

46. *Id.* at 782-85, 269 So. 2d at 242-43 (Attorney Plotkin advised the heirs to accept a compromise agreement which settled the estate without advising them about their rights under a forced portion.).

47. *Id.* at 786, 269 So. 2d at 244.

48. *Id.* at 787, 269 So. 2d at 244 ("According to the expert testimony in this case, every lawyer undertaking to advise clients on succession rights must know the basic concepts of forced heirship . . . . Moreover, even without expert testimony we would necessarily take notice that a legal duty is breached when the attorney fails to recognize such an obvious encroachment upon the legitime and to properly advise clients . . . .").

49. In *Ramp v. St. Paul Fire & Marine Ins. Co.*, 254 So. 2d 79, 82 (La. App. 1971) the Louisiana Court of Appeals defined the standard of care as "that degree of care, skill and diligence which is commonly possessed and exercised by practicing attorneys in his jurisdiction . . . ." However, on appeal the Louisiana Supreme Court substituted "locality" for "jurisdiction" without any explanation. *Ramp*, 263 La. at 787, 269 So. 2d at 244. Since that decision, Louisiana courts have applied a locality based standard in legal malpractice litigation even though the alleged negligence involved other than the application of local rules, customs, or practices. See, e.g., *Corceller v. Brooks*, 347 So. 2d 274, 277 (La. App. 1977), *cert. denied*, 350 So. 2d 1223 (La. 1977); *Watkins v. Sheppard*, 278 So. 2d 890, 892 (La. App. Ct. 1973).

*Dean v. Conn*<sup>50</sup> the issue was whether the attorney's inquiry into who constituted heirs at law of the decedent's property was acceptable when the attorney prepared a title certificate.<sup>51</sup> The court stated the attorney's conduct was to be judged "in accordance with the knowledge, skill and ability ordinarily possessed and exercised by members of the legal profession in Alcorn County, Mississippi."<sup>52</sup> However, as in *Russo* and *Ramp*, the underlying issue did not involve the attorney's application of a local rule or ordinance. Rather, the conduct involved general legal skills. The fact that the decedent's property was located in Alcorn County, as opposed to another county in Mississippi, should not have affected the inquiry into how diligent an attorney must be in researching and preparing a title.<sup>53</sup>

Application of the locality rule in *Dean* did not limit the availability of local expert testimony because the plaintiff was able to produce a local attorney to testify as to the appropriate standard of care.<sup>54</sup> The locality rule, however, did limit the scope of the expert's testimony because the testimony specifically referred to the standard of care used by attorneys in Alcorn County while researching and preparing titles.<sup>55</sup> The expert testified, and the jury found, that the attorney did not meet the appropriate standard.<sup>56</sup> However, had there been expert testimony that attorneys in Alcorn County research and prepare titles in the same fashion as the defendant did, and the finder of fact was unwilling to find the local practice unreasonable,<sup>57</sup> then the alleged misconduct would have comported with the applicable standard of care, and therefore the attorney would not have been negligent.

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50. 419 So. 2d 148 (Miss. 1982).

51. *Id.* at 148.

52. *Id.*

53. *See infra* note 57.

54. *Dean*, 419 So. 2d at 151.

55. *Id.*

56. *Id.* at 151-54.

57. *See, e.g.,* Gleason v. Title Guar. Co., 300 F.2d 813, 814 (5th Cir. 1962), *reh'g denied*, 317 F.2d 56 (5th Cir. 1963). In *Gleason*, the plaintiff-title insurance company sued the defendant-attorney for damages arising from the plaintiff's reliance on the defendant's certification of clear title. *Id.* at 813. Although the defendant-attorney gave written certification that he had examined personally either the public records or an abstract to determine clear title, he admitted at trial that he had relied on information given to him over the telephone by an abstract company. *Id.* at 814. The defendant-attorney defended his actions, arguing "that it was customary in Brevard County, Florida, . . . for lawyers to make certifications of title as he had done . . ." *Id.* The court rejected the defendant's reliance on the local custom, stating: "While custom provides an important indication of what constitutes reasonable care and what is negligent, it is not dispositive of the question at issue. All customs are not good customs, and lawyers have no prescriptive right to make knowingly false statements in the name of custom." *Id.* (citation omitted).

As the above cases illustrate, the application of the locality rule does not always relate to the application of local rules or ordinances that affect an attorney's action. The issues facing the attorneys in *Russo*, *Ramp*, and *Dean* were legal problems that confront attorneys everywhere. The continued adherence to a locality based standard hinders the prosecution of legal malpractice claims because it limits available expert witnesses. The application of the locality rule also allows different results between communities because it allows a locality to set its own standard. The standard set in a particular community may be considered unacceptable in other communities or states, thus creating a variation among jurisdictions.<sup>58</sup> These deficiencies of the locality rule indicate a need for courts or legislatures to formulate a standard of care which effectively prescribes acceptable attorney conduct under the circumstances regardless of where the attorney practices.

### C. *The Statewide Standard of Care*

Faced with a challenge to the locality rule, the Vermont Supreme Court overruled its prior decisions and adopted a standard of care based upon the "degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in this jurisdiction."<sup>59</sup>

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58. Even under a locality based standard, if the standard of care set by the customary actions of local attorneys is too low, then that standard should be rejected by the court. *Id.* A low standard of care set by a locality should be rejected because:

[n]o group of individuals and no industry or trade can be permitted, by adopting careless and slipshod methods to save time, effort or money, to set its own uncontrolled standard at the expense of the rest of the community. If the only test is to be what has always been done, no one will ever have any great incentive to make any progress in the direction of safety. It follows, therefore, that whenever the particular circumstances, the risk, or other elements in the case are such that a reasonable man would not conform to the custom, the actor may be found negligent for conforming to it . . . .

RESTATEMENT (SECOND) OF TORTS § 295A comment c (1977).

59. *Russo v. Griffin*, 147 Vt. 20, 24, 510 A.2d 436, 438 (1986) (quoting *Cook, Flanagan & Berst v. Clausing*, 73 Wash. 2d 393, 395, 438 P.2d 865, 867 (1968)). An intermediate standard of care formulation which *Russo* did not consider is a standard based upon the members of the legal profession in the same or similar locality under similar circumstances. See, e.g., *Smith v. Lewis* 13 Cal. 3d 349, 356 n.3, 530 P.2d 589, 592-93 n.3, 118 Cal. Rptr. 621, 624 n.3 (1975). The same or similar locality/situation standard expands the scope of the standard beyond the attorney's locality to include those localities where attorneys are engaged in similar practice or to include the attorneys who are engaged in the same practice in similar localities. RESTATEMENT (SECOND) OF TORTS § 299A comment g (1977) ("The standard is rather that of persons engaged in similar practices in similar localities, considering geographic location, size, and the character of the community in general."). The expanded standard assumes that the legal practice in the similar localities is the same

In overturning the locality rule, the court noted that the rule has been rejected in medical malpractice litigation because of the immunization of local practitioners from malpractice liability and a conspiracy of silence among potential expert witnesses in the plaintiff's locality.<sup>60</sup> In *Russo*, the defendant-Griffin argued that the reasoning used to reject the locality rule in medical malpractice litigation was inapplicable to legal malpractice. Griffin claimed the important difference between legal and medical malpractice is that knowledge of local practices, rules and customs is essential to proper legal practice, while such local knowledge is not a concern for the medical practitioner.<sup>61</sup> The court, however, rejected that argument.<sup>62</sup>

The court agreed with Griffin that "knowledge of local practices, rules or customs may be determinative of, and essential to, the exercise of adequate care and skill."<sup>63</sup> However, the court held that an attorney's knowledge of local factors did not mandate the continued application of the locality rule because knowledge of local practices, rules, or customs is included in the "knowledge" portion of the standard.<sup>64</sup> Because attorneys in Vermont are required to "familiarize themselves with . . . practices, rules, or customs peculiar to their area,"<sup>65</sup> the *Russo* court formulated the issue as whether a reasonable and prudent attorney would know of the local rule, custom, or practice and its application.<sup>66</sup>

In formulating its standard, the Vermont Supreme Court chose

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and therefore the factors influencing the attorney's action are the same. *Smith*, 13 Cal. 3d at 355 n.3, 358, 530 P.2d at 592-93 n.3, 595, 118 Cal. Rptr. at 624 n.3, 627 (approving jury instructions that the defendant attorney had a duty "to use the care and skill ordinarily exercised in like case by reputable members of his profession practicing in the same or similar locality under similar circumstances"). The effect of this expanded standard is that it allows experts from similar localities to testify on behalf of local plaintiffs. Allowing outside expert testimony prevents the immunization of local practitioners from malpractice liability and it also breaks the conspiracy of silence. The expanded locality standard, however, cannot assure the elimination of potentially unacceptable attorney conduct in a locality because, even though it allows outside testimony, the standard of care in the similar communities may be the same unacceptable conduct that is being challenged. See *infra* note 110 and accompanying text.

60. *Russo*, 147 Vt. at 23, 510 A.2d at 438. For a discussion of decisions rejecting the locality rule in medical malpractice litigation, see *infra* section II. For a discussion of immunization of local practitioners and the conspiracy of silence in legal malpractice litigation, see *supra* notes 35-38 and accompanying text.

61. *Russo*, 147 Vt. at 23, 510 A.2d at 438.

62. *Id.*

63. *Id.* at 24, 510 A.2d at 438 (quoting R. MALLIN & V. LEVIT, *supra* note 3, at § 254).

64. *Id.*

65. *Id.*

66. *Id.*

the state boundary as a geographic limitation<sup>67</sup> because the court found persuasive the argument that "the rules governing the practice of law do not vary from community to community but are the same throughout the state."<sup>68</sup> The court also noted that all Vermont attorneys must meet the same bar admission standards.<sup>69</sup> By selecting the state of Vermont as a basis for the standard of care, the court insured that all attorneys practicing within the state were subject to the same standard of care.

In *Cook, Flanagan & Berst v. Clausen*<sup>70</sup> the Washington Supreme Court defined the standard of care for attorneys as one based upon the skill and diligence of attorneys practicing within the state.<sup>71</sup> The Washington court, unlike Vermont, did not cite the medical-legal analogy as a basis for defining the standard of care for attorneys as one that is the same throughout the state.<sup>72</sup> Rather, the court cited the fact that "the standards of practice for lawyers in this jurisdiction as a qualification for the practice of law are the same throughout the state and do not differ in its various communities."<sup>73</sup> Thus, the Washington court recognized that all attorneys in the state should be required to meet a minimum standard of care.

Even though adopting a statewide standard of care eliminates potential differences in the standard between localities within a given state, it does not eliminate potential differences in the standard between states. Also, the limitation of outside expert testimony by a statewide standard of care creates the potential for a standard within the state which is unacceptable.<sup>74</sup> If all Vermont attorneys acquiesce

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67. *Id.*

68. *Id.* The court cited the *Restatement (Second) of Torts. Id.* In comment g, the *Restatement* indicates that allowance for the type of community is "made in professions or trades where there is considerable variation in the skill and knowledge possessed by those practicing in different localities . . . [but in the legal profession] . . . such variations either do not exist or are not significant." *RESTATEMENT (SECOND) OF TORTS* § 299A comment g (1977).

69. *Russo v. Griffin*, 147 Vt. 20, 24, 510 A.2d 436, 438 (1986).

70. 73 Wash. 2d 393, 438 P.2d 865 (1968).

71. *Id.* at 395, 438 P.2d at 867 ("the correct standard to which the [attorney] is held in the performance of his professional services is that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in this jurisdiction").

72. The Washington Supreme Court in *Pederson v. Dumouchel*, 72 Wash. 2d 73, 77, 431 P.2d 973, 977 (1967), while overturning the use of a locality rule in medical malpractice litigation, stated "[W]e note that the law of this jurisdiction has never recognized a difference in the professional competency of a lawyer in a small community from that of the professional competency required of a lawyer in a large city."

73. *Cook*, 73 Wash. at 395, 438 P.2d at 866.

74. Although the standard of care may refer to how attorneys in this jurisdiction or

in customary practices that may be or are considered unacceptable in other jurisdictions and the standard of care is that of a reasonable Vermont attorney, then the testimony by Vermont attorneys regarding what is acceptable legal conduct necessarily sets a low standard in the state.

#### D. *The National or General Standard*

The Vermont Supreme Court stopped short of adopting a national standard of care for legal malpractice litigation because "[u]nlike the medical profession, the legal profession has not yet established a certification and licensing process which is national in scope."<sup>75</sup> Justice Hayes, in a separate opinion, agreed that the locality standard should be abolished, but advocated in its place a "standard of care based upon the legal profession generally."<sup>76</sup> Justice Hayes noted that doctors in Vermont are subject to a general standard of care based upon how a reasonable member of the medical profession would act and therefore Vermont lawyers should be subject to a similar standard.<sup>77</sup>

Justice Hayes supported his argument for a general profession standard by noting the national nature of law school training and continuing legal education programs.<sup>78</sup> He also cited the emergence of multistate bar examinations as supporting a general standard, reasoning that if candidates for admission to the Vermont Bar must pass a multistate bar examination then they should be required to meet more than just a state standard of care.<sup>79</sup> The general profession standard also eliminates potential discrepancies in attorney performance based

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state would act under the circumstances, the customary local practice may be rejected by the court as being unreasonable. *See supra* note 57.

75. *Russo v. Griffin*, 147 Vt. 20, 25, 510 A.2d 436, 439 (1986) (citing *R. MALLIN & V. LEVIT*, *supra* note 3, at § 254).

76. *Id.* at 25-26, 510 A.2d at 439 (Hayes, J., concurring in part and dissenting in part).

77. *Id.* at 26, 510 A.2d at 439.

78. *Id.*

79. *Id.* Presumably, Justice Hayes argues that the use of a multistate bar examination supports the adoption of a national or general standard of care because the multistate exam was designed to provide local bar examiners with a uniform test of legal competence. *See, Covington, The Multistate Bar Examination—A New Approach*, 26 ARK. L. REV. 153, 155 (1972) ("The philosophy of the multistate bar examination program is to prepare an examination which will be adopted and used by the states with the assistance of the NCBE."). It is the standardization of the examination that underscores the national standard argument because initially "[c]onsideration was given to the possibility of regarding the new test as a 'national bar examination' so that applicants who pass the test would be admitted to practice in all states participating in the program." *Id.* However, because the multistate bar examination is a doctrine-oriented examination and much of a lawyer's daily

upon geography. No longer would expert testimony from outside the state be excluded as irrelevant to the plaintiff's burden of establishing that the defendant-attorney breached the appropriate standard of care within the state.<sup>80</sup> Eliminating discrepancies in the standard of care between states was important to Justice Hayes because he realized that standards which resulted in attorney conduct being considered negligent in one state and acceptable in another would lower the public's respect for the legal profession.<sup>81</sup>

The Georgia Supreme Court in *Kellos v. Sawilowsky*,<sup>82</sup> faced with the issue of whether the appropriate standard of care for legal malpractice is that of attorneys practicing within the state of Georgia or a general profession standard, rejected a geographic limitation and adopted a standard of care formulation based upon the legal profession generally.<sup>83</sup> The *Kellos* court concluded that the standard of care required of an attorney is constant regardless of where the attorney practices.<sup>84</sup> The court did note, however, that for "practicality in pleading" the standard was that of the state of Georgia because there was no "ascertainable standard of the 'legal . . . profession generally.'"<sup>85</sup> This "practicality in pleading" reference does not affect the Georgia court's adherence to a national or general standard because the court maintained that expert testimony must be based upon "the standard of care in the legal profession generally" rather than that of a locality.<sup>86</sup> The court held that only the application of the standard varies from situation to situation.<sup>87</sup>

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activities are transaction-oriented, using the existence of the multistate examination to justify adopting a national standard of care may be subject to criticism.

80. In his dissent, Justice Hayes pointed out that the state standard of care would allow the same conduct under the same circumstances to be considered negligent in New Hampshire and acceptable in Vermont. *Russo*, 147 Vt. at 26, 510 A.2d at 439 (Hayes, J., concurring in part and dissenting in part). Allowing lawyers from other states to testify as experts as to how a reasonable and prudent attorney would have handled the situation would eliminate these discrepancies because the inquiry would be how any reasonable attorney would have acted and not how attorneys in a particular state would have acted.

81. *Id.* This problem may arise even though most, if not all, people may not know or care what the required standard of care is for attorneys in their state. Those individuals who file a legal malpractice claim only to discover they cannot recover because, while their attorney's conduct would be considered negligent elsewhere, it conforms to the local standard of care, naturally will be critical of the legal profession for "protecting their own."

82. 254 Ga. 4, 325 S.E.2d 757 (1985).

83. *Id.* at 5, 325 S.E.2d at 757-58.

84. *Id.* at 5, 325 S.E.2d at 758.

85. *Id.* at 5-6, 325 S.E.2d at 758.

86. *Id.* at 4-5, 325 S.E.2d at 757-58 (quoting *Storrs v. Wills*, 170 Ga. App. 179, 181, 316 S.E.2d 758, 760 (1984)).

87. *Id.* at 5, 325 S.E.2d at 758. For the *Kellos* court, these variations in the standard occur because the general standard applied in a given case is particularized by "the number

The alleged negligence in *Kellos* was the attorney's failed attempt to arrange a silent one-half interest in a corporation for a client.<sup>88</sup> The attorney's action in *Kellos* was governed by the Uniform Commercial Code, and the application of standard legal principles such as the Uniform Commercial Code should not differ depending on the state of the attorney's practice. As in *Russo*, *Ramp*, and *Dean*, the attorney in *Kellos* was not applying a local rule or practice; rather, the attorney attempted to structure a transaction which was governed by a uniform rule applicable throughout the United States.<sup>89</sup> An attorney's arrangement of a business transaction which is governed by a uniform rule should be judged by how any reasonable attorney would act under the same circumstances and not by how Georgia attorneys would act.

New Hampshire has adopted by statute what appears to be a general standard of care for malpractice litigation:

In determining whether the person against whom a malpractice claim has been made has met the applicable standard of care, the jury or judge shall not be bound or limited by the standard of care accepted or established with respect to any particular geographical area or locality, but shall consider only whether the person against whom the claim is made has acted with due care having in mind the standards and recommended practices and procedures of his profession, and the training, experience and professed degree of skill of the average practitioner of such profession, and all other relevant circumstances.<sup>90</sup>

Although no reported decisions specifically hold the statute applicable to legal malpractice litigation, other New Hampshire legislation make its applicability clear.<sup>91</sup> This statute eliminates any reference to a geo-

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of options available to the attorney and the amount of time which he has to consider them." *Id.* at 5, 325 S.E.2d at 758 (quoting *Berman v. Rubin*, 138 Ga. App. 849, 851, 227 S.E.2d 802 (1976)). The standard is particularized because it is these circumstances that are important to the determination of what is reasonable legal conduct. *Id.*

88. *Kellos v. Sawilowsky*, 172 Ga. App. 263, 263, 322 S.E.2d 897, 897 (1984). In the original lawsuit the plaintiff alleged there was an oral agreement that she was to be a silent stockholder in a corporation through a series of loans repayable in stock. The court applied provisions of the Uniform Commercial Code to assess the validity of the arrangement. *Kellos v. Parker-Sharpe, Inc.*, 245 Ga. 130, 133, 263 S.E.2d 138, 140 (1980).

89. *Kellos*, 245 Ga. at 133 n.2, 263 S.E.2d at 140 n.2.

90. N.H. REV. STAT. ANN. § 508:13 (1983).

91. *Id.* at § 519-A:2. This section sets up an alternative disposition mechanism for professional malpractice claims. In defining the potential claims covered, the statute provides in part that:

Any person, or his legal representative, claiming damages by reason of injury, death, or monetary loss on account of alleged professional malpractice may informally and voluntarily submit against any lawyer, doctor, or dentist, against



graphic area or locality in determining whether the defendant-professional has met the applicable standard of care. Instead the statute requires the finder of fact to focus on whether the defendant-professional acted in conformity with the standards of the particular profession.

#### E. *A General Standard for the Legal Specialist*

The *Russo* court, even though unwilling to adopt a national standard of care for a general practitioner, indicated a willingness to apply a national standard to the legal specialist.<sup>92</sup> The need for uniformity in the practice of certain areas of law such as federal income taxation, securities law, patent law, and bankruptcy law justified the application of a standard devoid of any geographic limitation.<sup>93</sup>

The Supreme Court of Washington, in *Walker v. Bangs*,<sup>94</sup> recognized a national standard in certain cases when it held that a California lawyer could testify in a Washington court regarding the proper standard of care for prosecuting a federal maritime claim.<sup>95</sup> A territorial limitation on expert testimony in *Walker* was unnecessary because it involved a federally created claim governed by the substantive rules of maritime law and the federal rules of evidence and civil procedure.<sup>96</sup> As the *Walker* court noted, if defendant-attorneys hold themselves out as "specialists" then they should be judged against others who practice in the same field regardless of their locality.<sup>97</sup>

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whom he believes there is a reasonable basis for a claim to a hearing panel prior to the institution of any litigation as to said claim, and not thereafter.

*Id.* Another section of the chapter setting out the alternative disposition mechanism is entitled "Locality Rule Inapplicable" and contains the exact language of N.H. REV. STAT. ANN. § 508:13 except that "hearing panel" is substituted for "jury or judge." N.H. REV. STAT. ANN. § 519-A:7 (1974). It is clear, then, that the New Hampshire Legislature has abolished the application of the locality rule when a plaintiff presents a legal malpractice claim to the hearing panel. Therefore, because of the almost identical language in 508:13 and 519-A:7, it is likely that the locality rule is also inapplicable when a plaintiff elects to pursue actual litigation. Also, the New Hampshire Legislature made it clear that a general standard of care should be applied to determine what constitutes professional negligence.

92. *Russo*, 147 Vt. at 25, 510 A.2d at 439.

93. *Id.*

94. 92 Wash. 2d 854, 601 P.2d 1279 (1979).

95. *Id.* at 857, 601 P.2d at 1282. In allowing expert testimony from an out of state attorney, the court noted "the fact that Allan Brotsky is not licensed to practice in this state should go to the weight, not the admissibility of his testimony . . ." *Id.* at 859, 601 P.2d at 1282. Arguably, a court's indication that the fact that an attorney-witness is from outside the state affects the weight of his or her testimony may be infusing considerations of locality back into the general standard.

96. *Id.* at 859, 601 P.2d at 1283.

97. *Id.* at 860, 601 P.2d at 1283.

## II. THE EVOLUTION OF THE STANDARD OF CARE IN MEDICAL MALPRACTICE LITIGATION

Because of the similarity in the standard of care formulation for legal and medical practitioners,<sup>98</sup> analyzing the evolution of the medical standard from a strict locality to a general profession standard is important to the discussion of the evolution of the legal malpractice standard.<sup>99</sup>

The early medical malpractice cases applied a standard of care which focused on the locality of the physician's practice.<sup>100</sup> Courts considered the physician's locality important because "[i]n the smaller towns and country, those who practice medicine and surgery, though often possessing a thorough theoretical knowledge of the highest elements of the profession, do not enjoy so great opportunities of daily observation and practical operations . . . as those have who [sic] reside in the metropolitan towns . . . ."<sup>101</sup> The distinction between the rural and urban physician meant the rural physician "should not be expected to exercise that high degree of skill and practical knowledge possessed by those having greater facilities for performing and witnessing operations."<sup>102</sup>

Courts expanded the locality rule in the late nineteenth century to include similar communities because its application "effectively immunized from malpractice liability any doctor who happened to be the sole practitioner in his community."<sup>103</sup> The North Carolina Supreme

98. See *supra* note 9.

99. The evolution of the medical standard served as a basis for the *Russo* court to expand and change the legal malpractice standard in Vermont. *Russo v. Griffin*, 147 Vt. 20, 23, 510 A.2d 436, 438 (1986).

100. See, e.g., *Smothers v. Hanks*, 34 Iowa 286, 289-90 (1872); *Tefft v. Wilcox*, 6 Kan. 46, 62-64 (1870); *Small v. Howard*, 128 Mass. 131, 136 (1880).

101. *Tefft*, 6 Kan. at 63-64.

102. *Id.* at 64. See also *Smothers*, 34 Iowa at 289-90 ("It is also . . . true that the standard of ordinary skill may vary even in the same state, according to the greater or lesser opportunities afforded by the locality, for observation and practice, from which alone the highest degree of skill can be acquired."). The court in *Small* stated:

It is a matter of common knowledge that a physician in a small country village does not usually make a specialty of surgery, and, however well informed he may be in the theory of all parts of his profession . . . [h]e would have but few opportunities of observation and practice in that line such as public hospitals or large cities would afford.

*Small*, 128 Mass. at 136; Waltz, *The Rise and Gradual Fall of the Locality Rule in Medical Malpractice Litigation*, 18 DEPAUL L. REV. 408, 412 (1969) (The early locality rule compensated for the disparity of educational and training opportunities between the rural and urban medical practitioner.).

103. Waltz, *supra* note 102, at 411.

Court in *McCracken v. Smathers*<sup>104</sup> recognized the potential immunization of doctors:

The degree of care and skill required is that possessed and exercised by the ordinary members of his profession . . . . It cannot be measured simply by the profession in the neighborhood . . . [because] . . . '[n]eighborhood' might be construed into a very limited area . . . . It might contain but few dentists . . . [and] . . . [b]oth might be men of very inferior qualifications, and to say that they may set themselves up as the standard of a learned profession, and prove the standing of each by the ability of the other, would be equally unjust to the profession and to its patients.<sup>105</sup>

The medical malpractice standard of care has evolved in many jurisdictions to exclude reference to the physician's locality.<sup>106</sup> The

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104. 122 N.C. 799, 29 S.E. 354 (1898).

105. *Id.* at 803, 29 S.E. at 355.

106. See, e.g., *Green v. U.S.* 530 F. Supp. 633, 642 (D. Wis. 1982) ("degree of skill usually exercised by the average practitioner acting in the same or similar circumstances"); *aff'd*, 709 F.2d 1158 (7th Cir. 1983); *May v. Moore*, 424 So. 2d 596, 600 (Ala. 1982) ("The language 'same general neighborhood' refers to the national medical neighborhood or national medical community, or reasonably competent physicians acting in the same or similar circumstances."); *Zills v. Brown*, 382 So. 2d 528, 532 (Ala. 1980) ("[W]e are inclined to view that Alabama's 'same general neighborhood' rule does in fact encompass a national standard of care for reasonably skilled physicians acting in the same or similar circumstances . . . ."); *Sikorski v. Bell*, 167 Ga. App. 803, 805, 307 S.E.2d 701, 703 (1983) ("The standard of care for physicians . . . is not for the particular locality or community where the tort was committed but the standard of care considered by the profession generally to represent a reasonable degree of care and skill." (citations omitted)); *Shilkret v. Annapolis Emergency Medical Hosp. Ass'n*, 276 Md. 187, 200, 349 A.2d 245, 253 (1975) ("We . . . hold that a physician is under a duty to use that degree of care and skill which is expected of a reasonably competent practitioner in the same class to which he belongs, acting in the same or similar circumstances."); *Brune v. Belinkoff*, 354 Mass. 102, 109, 235 N.E.2d 793, 798 (1968) ("The proper standard of care is whether the physician . . . has exercised the degree of care and skill of the average qualified practitioner, taking into account the advances in the profession."); *Naccarato v. Grob*, 384 Mich. 248, 254, 180 N.W.2d 788, 791 (1969) ("geographic conditions, or circumstances control neither the standard of a specialist's care nor the competence of an expert's testimony"); *Hall v. Hilbun*, 466 So. 2d 856, 871 (Miss. 1985):

In the care and treatment of each patient, each physician has a non-delegable duty to render professional services consistent with that objectively ascertained minimally acceptable level of competence he may be expected to apply given the qualifications and level of expertise he holds himself out as possessing and given the circumstances of the particular case.

*King v. Williams*, 276 S.C. 478, 482, 279 S.E.2d 618, 620 (1981) ("Having reconsidered and examined the viability of the 'locality rule' in South Carolina today, we hereby discard this rule and adopt a standard of care not bound by any geographic restrictions."); *Farrow v. Health Serv. Corp.*, 604 P.2d 474, 476 (Utah 1979) ("that degree of skill and learning ordinarily possessed and exercised, under similar circumstances, by other practitioners in his field of practice"); *Pederson v. Dumouchel*, 72 Wash. 2d 73, 79, 431 P.2d 973, 978 (1967) ("No longer is it proper to limit the definition of the standard of care which a

Maryland Court of Appeals in *Shilkret v. Annapolis Emergency Medical Hospital Association*<sup>107</sup> responded to changes in the medical profession by adopting a national standard of care rejecting not only the locality rule, but also the similar locality rule.<sup>108</sup> The court rejected the similar locality rule because although it allows experts from other communities to testify as to what is acceptable conduct, there is still the potential for an unacceptable standard of care. This unacceptable standard may arise because the standard in the other communities may be the same standard of care as that being challenged.<sup>109</sup> The court in *Shilkret* adopted a national standard because:

[w]hatever may have justified the strict locality rule fifty or a hundred years ago, it cannot be reconciled with the realities of today. 'New techniques and discoveries are available to all doctors within a short period of time through medical journals, closed circuit television presentations, special radio networks for doctors, tape recorded digests of medical literature, and current correspondence courses.' [Citation omitted.] More importantly, the quality of medical school training itself has improved dramatically in the last century . . . . [T]here now exists a national accrediting system which has contributed to the standardization of medical schools throughout the country.<sup>110</sup>

Just as the medical standard responded to changes in the medical profession, the standard of care in legal malpractice has responded to changes within the legal profession.<sup>111</sup> However, evolution of the standard of care for legal malpractice from a strict locality to a national standard has been slower. This resistance to change stems from the presumption that "local considerations" are more important to the legal standard than they are to the medical standard.<sup>112</sup> However, the

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medical doctor or dentist must meet solely to the practice or custom of a particular locality, similar locality, or geographic area."); *Shier v. Freedman*, 58 Wis. 2d 269, 283-84, 206 N.W.2d 166, 174 (1973) ("that degree of care and skill which is exercised by the average practitioner in the class to which he belongs, acting in the same or similar circumstances").

107. 276 Md. 187, 349 A.2d 245, 248 (1975).

108. *Id.* at 196, 199, 349 A.2d at 250, 252.

109. *Id.* at 196, 349 A.2d at 250.

110. *Id.* at 194, 349 A.2d at 249 (quoting Note, *An Evaluation of Changes in the Medical Standard of Care*, 23 VAND. L. REV. 729, 732 (1970)).

111. *Russo v. Griffin*, 147 Vt. 20, 25, 510 A.2d 436, 438-39 (1986). The *Russo* court cited specialization as one factor that would support a national standard in some areas of practice. *Id.* at 25, 510 A.2d at 439. Also, the court cited the fact that the legal profession has yet to establish a national certification and licensing process similar to the medical profession as the reason for rejecting a national standard. *Id.* However, the court's language indicates that if the legal profession adopted a national certification and licensing process, the Vermont court may be willing to change the standard of care in response to it.

112. See, e.g., *Hall v. Hilbun*, 466 So. 2d 856, 871 (Miss. 1985). In rejecting the

existence of local factors, such as rules, practices, or customs, should not arbitrarily define the required standard of care in legal malpractice litigation by limiting the inquiry of proper conduct to a particular geographic area.<sup>113</sup> Instead, these local factors should be incorporated into the standard of care.

Although the *Russo* court used the medico-legal malpractice analogy as one reason to reject the locality rule in legal malpractice litigation,<sup>114</sup> it was not the court's sole rationale for changing the standard. The court also observed that "[i]n Vermont, the rules governing the practice of law do not vary from community to community but are the same throughout the state."<sup>115</sup> The court also noted that Vermont bar admission standards require that all attorneys wishing to practice in the state successfully meet established admission standards.<sup>116</sup>

A geographic limitation on the standard of care can protect attorneys from being second-guessed on the application of local law by those who are unfamiliar with it. Another, less justifiable reason may be that the local bar has a "club" atmosphere and distrusts the interference of "outsiders." However, a standard of care formulation without any geographic limitation yet incorporating all relevant local factors would offer the same "protection" as the locality rule without the adverse side effects of immunizing local practitioners or promoting a conspiracy of silence.

### III. A MODEL STANDARD OF CARE

#### A. *The Model Standard Defined*

A comprehensive standard of care should incorporate the criteria necessary to determine the adequacy of the attorney's conduct in a particular situation.<sup>117</sup> Richard E. Mallen and Victor B. Levit, in their book *Legal Malpractice*,<sup>118</sup> succinctly incorporate the necessary criteria into a "standard of competence" that is devoid of any geographic limitation: "*the attorney should exercise the skill and knowl-*

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locality rule in medical malpractice litigation, the Mississippi Supreme Court implied that it would continue to adhere to the locality rule in legal malpractice litigation. The court stated: "common sense and experience inform us that the laws of medicine do not vary from state to state in anything like the manner our public law does." *Id.* at 870. For a discussion of Mississippi's locality rule for legal malpractice litigation, see *supra* notes 50-57 and accompanying text.

113. See *supra* text accompanying notes 44-58.

114. *Russo*, 147 Vt. at 23-25, 510 A.2d at 437-38.

115. *Id.* at 24, 510 A.2d at 438. See also *supra* notes 71-73.

116. *Id.*

117. See *supra* note 4 and accompanying text.

118. R. MALLEN & V. LEVIT, *supra* note 3.

*edge ordinarily possessed by attorneys under similar circumstances.*"<sup>119</sup>

Under the Mallen and Levit standard, however, "[c]onsiderations of locality, custom and special skills are treated as the 'similar circumstances.'" <sup>120</sup> Mallen and Levit include "locality" as a similar circumstance because they treat it as a form of specialization,<sup>121</sup> which arises when the attorney is knowledgeable of local considerations, such as local rules, practices, and customs, which may be essential to a client's representation.<sup>122</sup> If the malpractice claim is based on an attorney's misapplication of a local practice or rule, then the question under a general standard of care would be whether a reasonable attorney would know of the rule or custom's existence and its practical applications.<sup>123</sup>

Although Mallen and Levit do not advocate abolishing the locality rule,<sup>124</sup> the standard of competence they advocate provides a useful model for courts to follow. The similar circumstances aspect of the model allows a judge to define the applicable standard of care for the jury, using the specific facts of the litigation.<sup>125</sup> Utilizing this model, the appropriate standard of care formulation in *Russo* would be:

Attorney Griffin should have exercised the knowledge and skill ordinarily possessed by attorneys advising a family held business on how to structure a corporate buy out when one of the parties wishes to sell his or her interest in the corporation in order to start a new, but different, business venture in the same community.

This formulation is an objectively based standard which incorporates all of the relevant factors that should have influenced attorney Griffin's advice. The model standard determines acceptable legal conduct by comparing Griffin's conduct, not with that of other Rutland area attorneys, but rather with the conduct of any reasonable attorney in similar circumstances.<sup>126</sup>

119. *Id.* at § 251 (emphasis in original).

120. *Id.*

121. *Id.* at § 254.

122. *Id.* Arguably, considering the attorney's locality in this manner may infuse a geographic limitation into the general standard of competence.

123. *Russo v. Griffin*, 147 Vt. 20, 24, 510 A.2d 436, 438 (1986).

124. R. MALLEN & V. LEVIT, *supra* note 3, at § 254 ("As with specialization, the erosion of local standards should be approached cautiously, aware of the practical consequences of change and only on a case by case basis.").

125. *Id.* at § 251 n.15.

126. By eliminating reference to the attorney's locality, the model standard of care may make the "local or customary" standard a risky and unreliable guide by which an attorney may gauge his or her conduct. Arguably, a national or general standard of care may not be certain enough to provide attorneys with a prospective guide by which they

### B. *The Rationale for the Model Standard*

The model standard has a number of advantages. Its focus on how a reasonable attorney would act under similar circumstances permits expert testimony regarding acceptable conduct from attorneys who practice outside the locality. This outside expert testimony prevents the immunization of local practitioners from malpractice liability because, although the inquiry remains a question of fact,<sup>127</sup> the model focuses on the circumstances that affected the attorney's decision and not the location of his or her practice.

The model also promotes consistency. Under a locality rule, conduct may be considered negligent in one state and under exactly the same circumstances be considered acceptable in another, because each state restricts expert testimony to local attorneys.<sup>128</sup> The model prevents this inconsistency because, although many expert witnesses will still be from within the general area of the defendant's practice,<sup>129</sup> the trier of fact will not be predisposed to disregard the out of state ex-

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may structure their conduct. Although this desire for a prospective guide is justifiable, our tort system traditionally has been reactive in defining what is considered negligent conduct. *See supra* note 57. Even though a state standard of care may provide more guidance for local attorneys through state bar journals and locally conducted continuing legal education programs, this note advocates a national or general standard to avoid the situation where the same conduct is considered negligent in one state and acceptable in another. Furthermore, looking to other local attorneys or the state bar may not be adequate because the majority of legal malpractice claims involve the basic principles of good legal practice to which all attorneys should adhere, regardless of the location of their practice. For example, Attorney William Gates explains that:

The information derived from the reports on errors is given more analytical significance by grouping the alleged errors under the following broad headings: Administrative errors, substantive errors, client-relations errors, and 'intentional' wrongs. This approach shows that 26.3% of the claims are made because of administrative matters such as calendaring, lost files, procrastination, and clerical error. Substantive errors result in 43.8% of the claims with the greatest errors consisting of the following: Failure to know or properly apply the law, inadequate investigation, planning error, and failure to know about a deadline. Client relations errors, such as failure to obtain consent or inform client, failure to follow client's instructions, and improper withdrawal, result in 16.2% of the claims. Intentional wrongs, such as abuse of process, fraud, and civil rights violations, make up 11% of all claims.

Gates, *supra* note 2, at 562.

127. Because the inquiry remains a question of fact, expert testimony generally will still be required to provide the trier of fact with a standard by which to judge the defendant-attorney's conduct. *Glidden v. Terranova*, 12 Mass. App. 597, 598, 427 N.E.2d 1169, 1170 (1981) (Expert testimony is required unless "the claimed legal malpractice is so gross or obvious that laymen can rely on their common knowledge or experience to recognize or infer negligence from the facts.").

128. *See supra* note 80 and accompanying text.

129. R. MALLIN & V. LEVIT, *supra* note 3, at § 667. ("Both parties prefer to obtain a local expert of sufficient reputation so as to impress or be known by the jury.").

perts' testimony simply because they are from a different locale.<sup>130</sup>

Because it focuses on reasonable conduct under the circumstances, the model standard of care does not prejudice general practitioners by subjecting them to a standard which compares their conduct to that of a legal specialist.<sup>131</sup> While the use of specialists as experts raises a concern that they will become "hired guns" for plaintiffs and thereby raise the standard of care, this concern may be overstated. The model standard of care necessarily will be defined by the facts of the litigation. For example, an attorney who specializes in stock transfers may not be a universally competent witness to testify regarding what advice a reasonable attorney would give a small closely held family business structuring a stock transfer between relatives. A specialist could testify only if he or she is experienced in similar situations or is familiar with what is considered appropriate advice under the circumstances. Also, the expert's testimony will not relate to how he or she would have advised the client but to how a reasonable attorney would advise the client under the specific circumstances.

Defining the standard of care by the circumstances of the case also makes the state boundary limitation unnecessary. If the attorney's conduct giving rise to the malpractice suit involves the application of a local or state substantive or procedural rule, then that "circumstance" would necessarily limit the available experts to those attorneys who are familiar with the rule.<sup>132</sup> In this situation, the out

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130. *Russo v. Griffin*, 147 Vt. 20, 22, 510 A.2d 436, 437 (1986) ("The court ultimately chose to accept the testimony of defendant's, rather than plaintiff's, expert witnesses on the premise that 'those attorneys whose practice primarily was conducted in the Rutland area . . . are more familiar with the standard of care . . . required of lawyers.'") (quoting the trial court's findings of fact).

131. However, there may be circumstances where a reasonable general practitioner would not handle a case because of its sophistication and therefore would have a duty to refer the client to a specialist. *Horne v. Peckman*, 97 Cal. App. 3d 404, 414-15, 158 Cal. Rptr. 714, 720 (1979); *Russo*, 147 Vt. at 25, 510 A.2d at 439. If the general practitioner fails to refer a client to a specialist and is allegedly negligent in handling the case, then that attorney should be held to the standard of care of attorneys specializing in the particular field. To hold the general practitioner to a different standard of care deprives the client of an assurance of reasonable representation under the circumstances.

132. If the alleged negligence is the attorney's misapplication of a procedural or substantive rule, then the issue would be how a reasonable attorney would have applied the rule. Attorneys who are familiar with the rule or a similar rule's application would be competent to testify. If the alleged negligence is the attorney's unawareness of the rule, then the issue would be whether a reasonable attorney would have become familiar with the rule before representing the client. Any attorney would be competent to testify whether a reasonable attorney would investigate the matter before representing a client. Also, even though the statute of limitations for a particular claim may vary from state to state, any attorney would be competent to testify that it is a breach of the attorney's professional duty to allow a statute of limitations to run, thereby barring a client's claim.



of state attorney inexperienced with the rule or its application is not a competent witness.

The *Russo* court stated that certain areas of substantive law—those that concern “national law” where “[i]t would be . . . inappropriate to have different standards of care in the practice of . . . [these areas] from state to state”<sup>133</sup>—lend themselves to a general standard of care.<sup>134</sup> However, other non-national substantive areas of law such as tort and contract are also based upon general legal principles which cut across jurisdictional boundaries.<sup>135</sup> It may be inappropriate for the standard of care regarding these general principles of law to vary from state to state.<sup>136</sup> The model standard facilitates the adoption of a standard which is national in scope yet fair to the local bar, because it limits expert testimony to attorneys familiar with legitimate local differences. The expert is also familiar with the particular area of practice involved in the malpractice litigation.<sup>137</sup>

The model also provides courts with a standard of care formulation that allows for comprehensive jury instructions. By defining the issue in terms of how a reasonable attorney would act under the circumstances of the case, the court gives the finder of fact a standard by which to evaluate conflicting expert testimony.<sup>138</sup> Utilizing the model standard to formulate jury instructions and to determine the acceptability of the defendant-attorney's conduct under the circumstances of the case is the same task that society imposes on the judicial system in any negligence claim.

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133. *Russo*, 147 Vt. at 25, 510 A.2d at 439 (“federal taxation law, securities law, patent law, and bankruptcy law”).

134. *Id.*

135. In designing the multistate bar examination, the National Committee of Bar Examiners chose contracts, criminal law, evidence, real property, and torts as substantive areas of law that could be tested on a national scale. Covington, *supra* note 79, at 154.

136. Even though some legal principles, such as comparative versus contributory negligence, may vary from state to state, the appropriate conduct of an attorney practicing in a comparative negligence state necessarily should not be measured solely against other attorneys practicing in that state. The question should be how a reasonable attorney would act under the circumstances, one of the circumstances being that the jurisdiction applies comparative negligence principles. If the attorney from a comparative negligence jurisdiction represents a client in a jurisdiction applying contributory negligence principles, the question remains how a reasonable attorney would act under the circumstance of being in a contributory negligence jurisdiction. Holding the out of state attorney to the same standard of care is necessary to protect a client from the attorney's ignorance of the foreign law. *New Developments in Legal Malpractice*, *supra* note 39, at 420-21.

137. R. MALLIN & V. LEVIT, *supra* note 3, at § 251 n.15.

138. See *supra* pages 404-07 for the formulation of the standard of care applicable in *Russo*.

## CONCLUSION

*Russo v. Griffin* is a step in the right direction. The Vermont Supreme Court realized that the locality rule in legal malpractice litigation is no longer justified. However, the court's focus on the analogy to the evolving standard of care in medical malpractice litigation is unfortunate; the court was unwilling to adopt a "national or general" standard until the legal profession adopts a national certification and licensing process similar to that of the medical field.<sup>139</sup>

An analysis of the rationale for the locality rule indicates that any geographic limitation is inappropriate in defining the required standard of care. The issue for the trier of fact should be whether the attorney acted reasonably under the circumstances and not whether his or her actions conformed with how other local attorneys act. A locality rule unnecessarily limits available expert witnesses, potentially insulates local attorneys from liability, and promotes a conspiracy of silence. Defining the standard of care in terms of what is reasonable conduct under the specific circumstances of the case eliminates these deficiencies of the locality rule while providing a minimum standard which all attorneys must meet.

The model proposed by this note provides a standard which is fair to both the legal profession and the public. Attorneys are assured that their conduct will be judged only against other attorneys facing similar circumstances, while members of the public are assured that attorneys who represent them will be held to the standard of reasonable attorney conduct under the circumstances of each case and not exclusively how local practitioners usually have handled the matter.

*John R. Skelton*

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139. See *supra* note 75 and accompanying text.